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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and BRIEF IN SUPPORT OF MOTION

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MOTION OF NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

In accordance with Rule 36 of the Supreme Court of the United States, the National Association of Secondary School Principals (NASSP) by its attorney, respectfully petitions the Court for leave to file a brief amicus curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in the above titled action.

This motion is made because the question presented in this case involves an important legal issue affecting public education throughout the United States, and an issue which has been the subject of considerable disagreement, if not actual confusion, in the lower courts.

The issue is whether the Establishment Clause of the First Amendment of the United States Constitution requires the denial of equal access to a small group of high school students who wish to meet on public school property, outside of regular instructional hours for the purpose of conducting group prayer or other religious activities.

Thus far, three U.S. Courts of Appeal have ruled that such activity is not permissible under the Establishment Clause, but numerous federal district courts and state legislatures have thought other-

wise, and in the second session of its 98th Congress, both Houses of the United States Congress passed, and the President of the United States signed, legislation which would not only permit, but would direct, public high schools to permit such activity.

While the parties have not given their consent to the filing of this motion and brief, because of the importance of the issues here presented, the NASSP humbly urges their acceptance.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

INTERESTS OF AMICUS CURIAE

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators and the formulation of all aspects of educational policy in the United States, and to improve programs for students enrolled

in the schools. Although NASSP customarily does not seek to intervene in private litigation, it believes that this case involves issues of such fundamental importance as to make an expression of its views essential.

The NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in school environment and in the role of education in society. For these reasons it works with many other organizations, private as well as public to promote research and development designed to strengthen both the instructional programs and management of the public schools. It is out of this background of experience and concern that the NASSP presumes to enter this case as amicus curiae to aid in securing fair and full consideration of the issues it presents.

SUMMARY OF FACTS and HISTORY OF THE CASE

The facts of the case have never been in dispute by the parties, and we will assume they are essentially as stated in the opinions of the Third Circuit of the United States Court of Appeals, and the Federal District Court for the Middle District of Pennsylvania.

In essence, these facts present a situation in which a small group of students desired to form a club, to be called "Petros" which would meet in some kind of organized manner in a classroom of the Williamsport, Pennsylvania, High School during a 30-minute period prior to the regular instructional period, this period being set aside on certain days of the week for students to attend and participate in extra-curricular clubs and activities of

their choice. Initially, the principal granted permission to the club's organizers, although he advised them they could not publicize its meetings by using the public address system or bulletin boards.

Sometime after the first meeting of Petros was held, the principal reconsidered his decision, and advised the students that they could not hold any more meetings of their group until he received approval from the superintendent and the school's attorney. Shortly thereafter, the students were advised in a letter from the superintendent that it would be "legally improper for a school district to approve or endorse" religiously oriented student meetings of the kind represented by Petros, at least until the superintendent received

advice to the contrary from the school's legal counsel. After careful consideration of additional information submitted by the students, counsel issued a written opinion concluding that the First Amendment would not permit the student group to meet during the activity period.

Following an appeal to the board which upheld the superintendent's position, this suit followed, and both superintendent and principal found themselves named as defendants along with the board and the district itself, despite the fact that in its denial of the students' appeal, the president of the board made clear that neither the board nor any administrative officer of the district regarded the proposed group as being "unworthy" but only that "present law simply does not permit public schools to authorize or support religious activities on school property."

The principal legal issue presented to the courts below, and now to this Court, is whether the school district's understanding of the First Amendment is correct. The Federal District Court for the Middle District of Pennsylvania ruled by summary judgment in favor of the students that the school district's position was wrong. An appeal was made by one defendant, then a member of the school board, and a three judge panel of the United States Court of Appeals, Third Circuit, disagreed with the reasoning of the lower court, and reversed its decision. Following denial by the Third Circuit of the students' petition for rehearing by the panel or for rehearing en banc, the present petition for review was filed.

ARGUMENT IN SUPPORT OF PETITION

As noted in the summary of the facts and history of the case above, this dispute occurred and has continued not because of any

real opposition by most of the defendants to the actions or desires of the student plaintiffs. Certainly the principal, superintendent and school board president have, at various times, made clear their sympathy with the student plaintiffs. Refusal to permit the student meetings was based solely upon the administrators' understanding of the law relating to the Establishment Clause of the First Amendment, and this understanding was in turn based on advice of the school district's counsel. Unfortunately, the validity of this position is subject to considerable question as evidenced by the subsequent disagreement between the district court and the court of appeals in this case, as well as by the opinions of a number of other courts which have reviewed this and related questions in recent years.

We believe that both the plaintiff students and the school defendants have

good and adequate reasons to believe in the correctness of their legal positions. The NASSP is not committed to either legal position, but sincerely believes that an issue of much importance and concern to so many people throughout our country can only be resolved by a clear determination by this Court. The present situation is unfair both to students desiring to exercise what they believe to be their constitutional rights, and to school administrators and board members seeking to preserve and uphold the United States Constitution, and to carry out their official duties.

It is particularly unfair to our members, the principals and other local site administrators of the public schools that they should be required to make decisions in good faith and under advice of counsel which nevertheless subject them to legal challenge and all of the burdens connected therewith. In regard to the present situa-

tion, the principals may well be exposed to suit regardless of which way they decide. The impossibility of this situation has now been intensified by the enactment and passage of the so-called Equal Access Act by the U.S. Congress. (Title VII of Public Law 98-377, 98 Stat. 1302 [1984]).

It is therefore not the concern of NASSP that the issue presented in the case at bar be decided in favor of one or the other of the parties, but only that it be decided by this Court in a manner that resolves the questions presented for the guidance of all of the country's federal courts and for the many citizens, administrators and students alike who share the concerns of the parties here involved.

To this extent, at least, we would concur with the arguments presented by petitioners to this Court headed "Reasons for Granting the Writ" (pages 20-28). As there stated, regardless of which party

is right, the existing uncertainty on the issue involved in this case is confusing to school administrators, and subjects them unfairly to a variety of pressures coming from different directions. In responding to these pressures without adequate guidance from the courts, different school districts and their administrators necessarily exacerbate the situation by making conflicting decisions which can only increase the confusion in which all must flounder.

As we view it, the following are at least some of the issues which require resolution, and which are raised in this case:

1. Does the Establishment Clause preclude all student group activity of a religious nature in a public high school, even if such activity is voluntary, and student initiated?

If so, what is the basis of the pro-

hibition in terms of the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971) -- purpose, primary effect, or entanglement?

2. If some student group religious activity is permissible in a public high school, as this Court suggested it is at the college level, (Widmar v. Vincent, 454 U.S. 263 [1981]), what are the parameters of such permissible activity?

3. Even if the Establishment Clause would otherwise preclude student group religious activity in public high schools, does the equivalent First Amendment right of freedom of expression overcome this preclusion under the doctrine that a "limited open forum" has been created if school authorities give every other kind of student group the opportunity to meet on school property during a non-instructional period?

This is apparently the position adopted by the federal district court in the case

at bar (Bender v. Williamsport Area School District, 563 F. Supp. 697, 714 and 716, [M.D. Pa.] 1983) and the assumption of the Congress underlying its enactment of the Equal Access Act.

We are aware that the demands placed upon this Court are heavy, and that the number of petitioners for review far exceed the number which the Court can accept. As noted by petitioners in this case, however, the Court has accepted at least two cases involving religious activity on public property in the past year, neither of which has occasioned the conflict among the lower courts, nor the degree of public confusion which exists in the case at bar. (Jaffree v. Wallace, 52 U.S.L.W. 3719, U.S. April 2, 1984, No. 83.812; and McCreary v. Stone, 739 F.2d 716, (2nd Cir. 1984), cert. granted, 53 U.S.L.W. 3285, U.S. Oct. 16, 1984, No. 84-277.)

As indicated by the federal district court in the case at bar, numerous federal courts have "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absoiute terms and either of which, if extended to a logical extreme, would tend to clash with the other." (Bender, 563 F. Supp. 697, 716-717.) Only the Supreme Court of the United States can define that course so as to resolve the contentious issues now wracking our public schools.

CONCLUSION

For the reasons given above, we urge that the Court grant certiorari and accept this case for review and decision.

Respectfully submitted,

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